BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2020-89-E
DOCKET NO. 2020-90-E

In the Matter of:	)	**SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND SOUTHERN ALLIANCE FOR CLEAN ENERGY RESPONSE TO DUKE ENERGY CAOLINAS, AND DUKE ENERGY PROGRESS PETITION FOR A DECLARATORY ORDER**
Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's 2021 Avoided Cost Proceeding Pursuant to S.C. Code Ann. Section 58-41-20(A)n 58-40-20	)	

INTRODUCTION

Southern Alliance for Clean Energy ("SACE") and South Carolina Coastal Conservation League ("CCL") (collectively, "SACE/CCL") appreciate the opportunity to respond to the petition (the "Petition") filed by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, "Duke Energy" or "Duke") requesting that the Public Service Commission ("Commission") issue a declaratory order finding that attorneys may communicate with their witnesses during the interim period between direct and rebuttal testimony, while those witnesses are still under oath.. As Duke Energy notes in its petition, this issue arose during the evidentiary hearing on the Duke Energy 2020 Integrated Resource Plans ("IRPs") in Docket Nos. 2019-224-E and 2019-225-E when it became evident that Duke Energy was conferring with its witnesses in between the witnesses' presentation of direct and rebuttal testimony. In that proceeding, SACE/CCL argued that Duke Energy's communications with its witnesses between their direct and rebuttal

testimony were in violation of well-established South Carolina law that counsel may not communicate with witnesses while those witnesses are under oath. The Commission agreed.

Now, for a second time, SACE/CCL respectfully request that the Commission reject Duke's erroneous interpretation of South Carolina law and deny Duke's petition for a declaratory ruling. First, the Commission clearly answered the question posed in Duke's petition for a declaratory ruling at the evidentiary hearing on the Duke Energy IRPs, making the Petition unnecessary and redundant. Second, contrary to Duke Energy's assertions, the explicit prohibition in Rule 30(j)(5) of the South Carolina Rules of Civil Procedure against attorney-client communications during depositions governs client-counsel communications between direct and rebuttal testimony. Finally, Duke Energy's remaining arguments that a witness's right to counsel and the public interest demand a different set of rules governing attorney-client communications in hearings before the Commission are misplaced, and should be rejected.

ARGUMENT

I. The Commission has already answered the issue presented in the Petition, stating clearly at the hearing on the Duke Energy IRPs that attorney-client communications are not permitted between direct and rebuttal testimony, while witnesses remain under oath.

The legal question posed in the Petition has already been answered by Chairman Williams during the hearing on the Duke Energy 2020 IRPs. After a substantive and extensive oral argument, Chairman Williams stated: "Please know that as long as I'm Chairman, the rule is when a witness is sworn in they can't talk about their testimony with anyone until the testimony—all of their testimony is complete and they are excused." Tr.

at 1313.[1] Indeed, Chairman Williams expressed surprise that this was an issue at all, stating that "in my practice it's pretty basic that once a witness is sworn in that they should not discuss their testimony with anyone, let alone their lawyer, unless the testimony is complete and [the witness is] excused…." Tr. at 1312-13. As Carolinas Clean Energy Business Association counsel Richard Whitt noted at the hearing, the Chairman's reminder to the witnesses that they are still under oath when they finished presenting their direct testimony would be meaningless if the rule prohibiting witness-counsel communications did not apply to the period between direct and rebuttal testimony. *See* Tr. at 1297.

Moreover, Chairman Williams articulated this clear interpretation of law after being presented with the same arguments Duke Energy now makes in its Petition, including that there is no explicit rule prohibiting this communication and that the right to counsel in civil trials requires such communication. *Compare* Petition at 2-3, *with* Tr. at 1292; *compare* Petition at 3-4, *with* Tr. at 1293. In light of this history, the Petition should be rejected on the basis that it merely seeks to reargue an issue that is already resolved.

II. The explicit prohibition in SCRCP Rule 30(j)(5) against witness-counsel communications during depositions governs witness-counsel communications between direct and rebuttal testimony.

Well-established South Carolina law clearly prohibits witness-counsel communications while the witness remains under oath. This rule is so basic to South Carolina proceedings that a pamphlet released by the South Carolina Bar titled "So You're Going to Try Your First Case…" instructs new lawyers that: "[w]hen a witness is on the witness stand, and the judge takes a break in the trial, the witness may not discuss his testimony with you or other people (friends or other witnesses) until he retakes the stand

[1] The transcript cited throughout this Response is from the Duke Energy IRPs Hearing (Docket Nos. 2019-224-E, 2019-225-E).

and completes testimony…This rule applies in civil and criminal trials." *So You're Going to Try Your First Case…*" at 90-91, S.C. Bar (5th ed. 2018).[2] While the pamphlet does note that criminal defense attorneys may be required to speak with their clients during long breaks in *criminal* trials, this exception does not apply in the civil context. *Id*.

The most explicit statutory pronouncement of this rule is made in the context of depositions; the rule provides that:

> Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

S.C. R. Civ. P. 30(j)(5). The South Carolina Supreme Court has explained that "a deposition's beginning signals the end of a witness's preparation," and that "even during breaks in the deposition *such as a lunch or overnight break*, witnesses and their counsel cannot talk substantively about prior or future testimony in the deposition." *In re Anonymous Member of S.C. Bar,* 552 S.E.2d 10, 17 (S.C. 2001) (emphasis added).

There is no reason Rule 30(j)(5) and its underlying rationale would be limited, as Duke Energy asserts, to deposition conduct. Rather, the rule is intended to align depositions with the same rules that ensure the integrity of testimonial evidence at trial. *See Hall v. Clifton Precision, a Div. of Litton Sys., Inc.*, 150 F.R.D. 525, 528 (E.D. Pa. 1993); *see also In re Anonymous Member of S.C. Bar*, 552 S.E.2d at 16-17 (indicating through extensive citation of *Hall* that the South Carolina Supreme Court agrees with and adopts the Pennsylvania court's reasoning). Indeed, depositions are conducted in such a manner to

[2] Available at https://www.scbar.org/media/filer_public/d8/49/d849ee6a-b9d8-4bad-93e5-ba876d27383c/first_case_-_toc.pdf.

ensure their admissibility at trial. Rule 30(j) of the South Carolina Rules of Civil Procedure is intended to provide deposition guidelines similar to those used in federal district court in South Carolina, and in federal courts, depositions are intended to be conducted as if the witness was testifying at trial. *See* Note to 2000 Amendment to S.C. R. Civ. P. 30(j) (stating that Paragraph (j) was added to provide deposition guidelines similar to those used in federal district court in South Carolina) *and In re Cathode Ray Tube Antitrust Litig.,* No. 14-CV-2058-SC, 2015 WL 12942210, at *3 (N.D. Cal. May 29, 2015) ("…as in all federal courts, depositions are to be conducted as if the witness were testifying at trial. FRCP 30(c). Courts have ruled that once a deposition begins, counsel should not confer with the witness except to determine whether a privilege should be asserted.").

In civil trials, "a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own." *Hall*, 150 F.R.D. at 528. In both depositions and at trial, "[t]he underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth." *Id*. The procedural safeguards at both depositions and trial ensure that "[i]t is the witness—not the lawyer—who is the witness," *In re Anonymous Member of S.C. Bar*, 552 S.E.2d at 17 (quoting *Hall*, 150 F.R.D. at 528), whereas lawyer coaching threatens to eliminate that distinction and obstruct the truthfulness of testimony.

The prohibition on witness-counsel communications while a witness is under oath applies in Commission proceedings as well. In the absence of specific Commission rules, past Commission orders have cited the South Carolina Rules of Civil Procedure in testimonial matters, including Rule 30 specifically. *See* Order No. 2005-25; Order No. 2003-550. Moreover, numerous Commission regulations explicitly incorporate the South

Carolina Rules of Civil Procedure into Commission procedure. *See* S.C. Code Ann. Regs. 103-817.1(C), 103-831, 103-832, 103-835; *see also* S.C. Code Ann. Regs. 103-846(A) ("The rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed."). More generally, in the absence of a specific rule to the contrary, the South Carolina Rules of Civil Procedure apply to administrative proceedings.[3] *See Mead v. Beaufort Cty. Assessor*, 796 S.E.2d 165, 168 (S.C. Ct. App. 2016) ("[T]he South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules." (citing Rule 68, SCALCR)).

Accordingly, the prohibition on witness-counsel communications extends to proceedings before the Commission, an administrative body that holds hearings and requires witness to swear an oath in furtherance of the same truth-seeking objectives that govern trial and deposition conduct. Duke Energy's argument that this rule is limited to deposition testimony is particularly unpersuasive given the rationale underlying the rule prohibiting witness-counsel communications. The circumstances of depositions, given the increased chances of longer, even overnight night breaks during testimony, may have merely provided the occasion to make this foundational rule explicit. But maintaining the integrity of testimonial evidence is vital in depositions, civil trials and Commission proceedings.

III. The Fifth Amendment right to counsel is not implicated by Duke Energy's decision to split up its witnesses' direct and rebuttal testimony.

Though Duke Energy maintains that, in the absence of any explicit directive prohibiting witness-counsel communications, the due process clause of the Fifth

[3] In fact, in numerous instances—including in all discovery matters—Commission regulations explicitly refer to the South Carolina Rules of Civil Procedure. *See* S.C. Code Ann. Regs. 103-817.1(c), 103-831, 103-832, 103-835.

Amendment guarantees a party's right to counsel during the period between direct and rebuttal testimony, the Fifth Amendment right to counsel is not implicated by the situation at issue in the Petition.

First of all, the only case[4] cited by Duke Energy that is arguably on point—a Fifth Circuit case from 1980—may no longer be persuasive law. In *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118–19 (5th Cir. 1980), the court held that a witness had a right to counsel during a seven day recess in a civil trial; however, this opinion predated *Perry v. Leeke*, 488 U.S. 272, 281 (1989), a U.S. Supreme Court opinion interpreting South Carolina law. In *Perry*, the Court affirmed the South Carolina Supreme Court's ruling in a criminal case that prohibiting such witness-counsel communication during recesses was permissible, holding that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying…neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." *Id.*; *see State v. Perry*, 299 S.E.2d 324, 326 (S.C. 1983) (accepting as "well-reasoned" the trial judge's justification for the rule that the defendant-witness "was not entitled to be cured or assisted or helped approaching his cross-examination."). Though this holding was made in

[4] The other Fifth Amendment cases cited in the Petition merely suggest that a witness may not be cut off from counsel throughout civil litigation, particularly at key decision-making points. *See Adir Int'l, LLC v. Starr Indem. & Liab. Co.,* 994 F.3d 1032, 1039-41 (9th Cir. 2021) (acknowledging that, according to *Potashnick*, "the right to retain counsel *might* be violated if a trial court prohibits a civil litigant from communicating with his or her retained counsel during breaks and recesses during a trial," but ultimately stating that "courts have construed the due process right to retain counsel very narrowly" and concluding that "as a practical matter, that means due process bars the government from actively preventing a party from obtaining counsel or communicating with his or her lawyer in civil cases" (emphasis added)); *Mosley v. St. Louis Sw. Ry*., 634 F.2d 942, 944-45 (5th Cir. 1981) (finding that plaintiff's right to counsel was violated when plaintiff's attorney was excluded from settlement discussions that led to the client signing agreement). Needless to say, no one disputes that a client has a right to confer with retained counsel throughout civil litigation.

connection with a brief recess, it was also issued in the criminal context where a defendant's right to counsel is entitled to additional protection.[5]

Perhaps more significantly though, the issue presented in the Petition is clearly distinguishable from the situation that gave rise to the *Potashnick* opinion. In *Potashnick* the client-witness had no choice as to whether to endure a lengthy recess, separated from counsel. *See Potashnick*, 609 F.2d at 1119. However, the situation at issue in the Petition exists only because Duke Energy's counsel is choosing, presumably for strategic reasons, to separate direct and rebuttal testimony rather than present the witnesses' consolidated testimony. Having chosen to present witnesses in such a way that draws out recesses during ongoing testimony, Duke Energy cannot then argue that its witnesses are being denied access to counsel. After all, it was counsel's choice to present the testimony accordingly, thereby limiting their access to the witnesses. Duke Energy's attempt to argue that the end of direct testimony is analogous to the "conclusion of [] testimony," Petition at 7 (quoting Babcock Affidavit, Ex. B, ¶ 11), does not make Fifth Amendment case law any more relevant. Unlike a situation where a witness may or may not be called for rebuttal testimony following the conclusion of the case-in-chief, testimony before the Commission is prefiled; for witnesses presenting both direct and rebuttal testimony, their testimony has not concluded until they have presented their rebuttal testimony—hence the Chairman's admonishment.

[5] For this reason, several courts have rejected the reasoning in *Potashnick. See, e.g., Aldridge on Behalf of United States v. Corp. Mgmt., Inc*, 2021 WL 2518221, at *41 (S.D. Miss. June 18, 2021) (rejecting Potashnick because it "predate[s] the U.S. Supreme Court case of Perry v. Leeke. Perry holds that when a defendant assumes the role of witness, he has no constitutional right to consult his lawyer while he is testifying."); *Reynolds v. Alabama Dep't of Transp.*, 4 F. Supp. 2d 1055, 1064–65 (M.D. Ala. 1998) (rejecting argument based on *Potashnick* because "when they filed their mistrial motion, the defendants completely failed to mention *Perry v. Leeke*, 488 U.S. 272 [] (1989), a later Supreme Court case that substantially clarified, and limited, the broad statements in *Potashnick* and *Geders* of a litigant-witness's right of access to counsel during breaks in testimony").

IV. The public interest will not be served by adopting Duke's interpretation.

Lastly, Duke Energy argues that allowing witness-counsel communications between direct and rebuttal testimony will serve the public interest by improving the parties' presentation to the Commission. Petition at 5-6. In reality, adopting Duke's interpretation would serve only Duke's interest in conferring with its witnesses. The public interest is better served by preserving the rules of trial that prevent counsel from "giv[ing] the appearance of obstructing the truth." *Hall*, 150 F.R.D. at 528. Indeed, the Commission, as a quasi-judicial body, *see* S.C. Code Ann. § 58-3-30, has an obligation to ensure the integrity and appearance of integrity in the proceedings before it—as it did in the hearings on the Duke Energy IRPs. Moreover, Duke Energy's practice of splitting up direct and rebuttal testimony has had the effect of making Commission proceedings more drawn-out, and therefore less accessible to public viewers. In addition, proceedings in which expert witnesses have to standby for several days to present their direct and then rebuttal testimony increases expert costs, costs which Duke Energy—unlike intervenors—may pass onto ratepayers. In short, the public interest is better served by rejecting Duke Energy's erroneous interpretation.

CONCLUSION

For the forgoing reasons, SACE/CCL request that the Commission deny Duke's request for a declaratory order, or in the alternative, issue a declaratory order stating that counsel may not communicate with their witnesses while those witnesses are under oath in the period between direct and rebuttal or surrebuttal testimony.

Respectfully submitted,

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I hereby certify that the parties listed below have been served via first class U.S. Mail or electronic mail with a copy of the *Response to Duke Energy Carolinas and Duke Energy Progress Petition for Declaratory* Order on behalf of the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy.

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This 26th day of July, 2021.

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